

# **HOUSE . . . . .      No. 4324**

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**The Commonwealth of Massachusetts**

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HOUSE OF REPRESENTATIVES, October 24, 2007.

The Committee of Conference on the disagreeing votes of the two branches with reference to the Senate amendments of the House Bill relative to the licensing requirements for certain tidelands (House, No. 4184) [amended by the Senate by striking out all after the enacting clause and inserting in place thereof the text contained in Senate document numbered 2309; and by striking out the emergency preamble and inserting the following emergency preamble:—

*"Whereas,* The deferred operation of this act would tend to defeat its purpose, which is to authorize a regulatory exemption for certain landlocked tidelands from license requirements, therefore it is hereby declared to be an emergency law, necessary for the immediate preservation of the public convenience."; and by striking out the title and inserting in place thereof the following title:

"An Act relative to the licensing requirements for certain tidelands."]

Reports the accompanying bill (House, No. 4324).

**The Commonwealth of Massachusetts**

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In the Year Two Thousand and Seven.

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AN ACT RELATIVE TO THE LICENSING REQUIREMENTS FOR CERTAIN TIDE-LANDS.

*Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same, as follows:*

1     SECTION 1. *WHEREAS*, The deferred operation of this act  
2 would defeat its purpose, which is to exempt structures, uses and  
3 activities within landlocked tidelands from licensing under  
4 chapter 91 of the General Laws, while ensuring that certain public  
5 trust rights to landlocked tidelands and other tidelands are prop-  
6 erly evaluated and addressed through state environmental  
7 review; and

8     *WHEREAS*, The supreme judicial court has held that the depart-  
9 ment of environmental protection lacks statutory authority to  
10 exempt landlocked tidelands from the licensing requirements  
11 established by chapter 91 of the General Laws; and

12     *WHEREAS*, The supreme judicial court has stated with respect  
13 to legislation dealing with public assets that:—(i) the legislation  
14 must be explicit concerning the land involved; (ii) it must  
15 acknowledge the interest being surrendered; (iii) it must recognize  
16 the public use to which the land is to be put; (iv) the action must  
17 be for a valid public purpose; and (v) where there may be benefits  
18 to private parties, those private benefits must not be primary but  
19 merely incidental to the achievement of the public purpose; and

20     *WHEREAS*, Exempting existing and future uses, structures, and  
21 improvements on landlocked tidelands from the licensing require-  
22 ments established by chapter 91 of the General Laws, serves  
23 proper public purposes, including, but not limited to, maintaining  
24 marketable titles, continuing the beneficial redevelopment and  
25 revitalization of landlocked tidelands, and encouraging public  
26 access to the waterfront; and

27     *WHEREAS*, The benefits to private parties are not primary but  
28 rather are incidental to the achievement of the public purposes.

1 SECTION 2. Section 61 of chapter 30 of the General Laws, as  
2 appearing in the 2006 Official Edition, is hereby amended by  
3 inserting after the word “grounds” in line 16, the following  
4 words:— ,reduction of groundwater levels, impairment of water  
5 quality, increases in flooding or storm water flows.

1 SECTION 3. Said chapter 30 is hereby further amended by  
2 inserting after section 62H the following section:—  
3 Section 62I. A person who is proposing a new use or structure  
4 or modification of an existing use or structure within landlocked  
5 tidelands as defined in section 1 of chapter 91 that is otherwise  
6 required to file an environmental notification form pursuant to  
7 section 62A and files an environmental notification form on or  
8 after November 15, 2007 shall comply with the requirements of  
9 this paragraph. The environmental notification form, and an envi-  
10 ronmental impact report required pursuant to section 62B, if  
11 applicable, shall include an explanation of the project’s impact on  
12 the public’s right to access, use and enjoy tidelands that are pro-  
13 tected by chapter 91, and identify measures to avoid, minimize, or  
14 mitigate any adverse impact on such rights set forth herein. If the  
15 project is located in an area where low groundwater levels have  
16 been identified by a municipality or by a state or federal agency as  
17 a threat to building foundations, the environmental notification  
18 form and an environmental impact report if the latter is required,  
19 shall also include an explanation of the project’s impact on  
20 groundwater levels, and identification and commitment to taking  
21 measures to avoid, minimize, or mitigate any adverse impact on  
22 groundwater levels. Any measures identified by the secretary  
23 under this section shall be set forth in a certificate on the environ-  
24 mental notification form or a certificate on the environmental  
25 impact report, if the latter is applicable. Within 30 days after a  
26 certificate is issued under this paragraph, the proponent of the pro-  
27 ject shall file with the department of environmental protection a  
28 completed form notifying the department that work will be con-  
29 ducted within landlocked tidelands, and shall attach the Massa-  
30 chusetts environmental policy act certificate to the form. The  
31 person who is proposing shall comply with all obligations set  
32 forth in the certificate under this section, and the department shall

33 have the authority to enforce such conditions consistent with this  
34 chapter.

1 SECTION 4. Section 1 of chapter 91 of the General Laws, as  
2 appearing in the 2006 Official Edition, is hereby amended by  
3 inserting after the definition of “Department” the following defin-  
4 ition:—

5 “Landlocked tidelands”, filled tidelands, which on January 1,  
6 1984 were entirely separated by a public way or interconnected  
7 public ways from any flowed tidelands, except for any portion of  
8 such filled tidelands that are presently located:— (a) within 250  
9 feet of the high water mark of flowed tidelands; or (b) within any  
10 designated port area under the Massachusetts coastal zone man-  
11 agement program. For the purposes of this definition, a public  
12 way may also be a landlocked tideland, except for any portion  
13 thereof which is presently within 250 feet of the high water mark  
14 of flowed tidelands.

1 SECTION 5. Said section 1 of said chapter 91, as so appearing,  
2 is hereby further amended by inserting after the definition of “Pri-  
3 vate Tidelands” the following definition:—

4 “Secretary,” the secretary of the executive office of energy and  
5 environmental affairs.

1 SECTION 6. Section 18 of said chapter 91, as so appearing, is  
2 hereby amended by inserting after the third paragraph the  
3 following paragraph:—

4 No license shall be required under this chapter for fill on land-  
5 locked tidelands, or for uses or structures within landlocked tide-  
6 lands.

1 SECTION 7. Said section 18 of said chapter 91, as so  
2 appearing, is hereby further amended by inserting after the word  
3 “tidelands”, in lines 52 and 53, the following words:— , except for  
4 landlocked tidelands.

1 SECTION 8. Said chapter 91 is hereby further amended by  
2 inserting after section 18A the following section:—

3     Section 18B. (a) The secretary shall serve as the administrator  
4     of tidelands. The secretary may appoint an individual or individ-  
5     uals to assist him in carrying out the duties of his office. The  
6     duties of this office may be exercised in combination with other  
7     duties, as the secretary shall see fit.

8     (b) The secretary shall conduct and complete a public benefit  
9     review for any proposed project that is:— (i) subject to the  
10    licensing provisions of section 13 or 18; or(ii) geographically  
11    located on landlocked tidelands, and in either case is required to  
12    file hereafter an environmental impact report pursuant to chapter  
13    30. The secretary may conduct and complete a public benefit  
14    review for any proposed project that is (i) subject to the licensing  
15    provisions of section 13 or 18; or (ii) geographically located on  
16    landlocked tidelands and in either case is required to file hereafter  
17    an environmental notification form pursuant to chapter 30. The  
18    public benefit determination of the secretary shall not supersede  
19    said chapter 30 or this chapter or any rules or regulations promul-  
20    gated pursuant thereto and shall not delay the issuance of a license  
21    pursuant to this chapter or the completion of a review or any step  
22    thereof pursuant to said chapter 30. At the completion of said  
23    review, the secretary shall make a public benefit determination,  
24    the goal of which shall be to publish on the public record a written  
25    public benefit determination of the project.

26    In making said public benefit determination, the secretary shall  
27    consider the purpose and effect of the development; the impact on  
28    abutters and the surrounding community; enhancement to the  
29    property; benefits to the public trust rights in tidelands or other  
30    associated rights, including, but not limited to, benefits provided  
31    through previously obtained municipal permits; community activi-  
32    ties on the development site; environmental protection and preser-  
33    vation; public health and safety; and the general welfare; provided  
34    further, that the secretary shall also consider the differences  
35    between tidelands, landlocked tidelands and great ponds lands  
36    when assessing the public benefit and shall consider the practical  
37    impact of the public benefit on the development.

38    The secretary shall promulgate regulations that may, among  
39    other things, exempt from the public benefit determination  
40    process the development of certain parcels of land, or certain  
41    activities, uses and structures on the land that are determined to be

42 of *de minimus* impact. The regulations shall also establish time-  
43 lines and procedures for the public benefit review, and the regula-  
44 tions may combine the public benefit review with the  
45 environmental review under chapter 30.

46 Any state or local agency holding a public comment period pur-  
47 suant to chapter 30 or this chapter shall provide copies of all  
48 written testimony submitted during said public comment period to  
49 the secretary.

50 The secretary shall provide the determination of public benefit  
51 to the department, and if there is an appeal of a decision or license  
52 issued by the department, to the division of administrative law  
53 appeals.

54 The department shall incorporate the public benefit determina-  
55 tion of the secretary in the official record.

56 (c) The secretary shall designate an individual to serve as the  
57 chapter 91 public information officer. The chapter 91 public infor-  
58 mation officer shall answer questions about the chapter 91  
59 process, providing history and context regarding chapter 91 and  
60 the public benefits process as it pertains to this chapter.

1 SECTION 9. Notwithstanding any general or special law to the  
2 contrary, the fourth paragraph of section 18 of chapter 91 of the  
3 General Laws, inserted by section 6, shall apply to all fill, uses  
4 and structures, whether existing before, on or after the effective  
5 date of this act.

1 SECTION 10. Notwithstanding any general or special law to  
2 the contrary, regulations issued by the department of environ-  
3 mental protection exempting landlocked tidelands from licensing  
4 before the effective date of this act are hereby validated and con-  
5 firmed as if this act had been in effect when such regulations and  
6 determinations of applicability were issued. Any fill, use or struc-  
7 ture developed pursuant to such regulations shall not be challenge  
8 on the ground that the department of environmental protection  
9 lacked the authority to issue such regulations and, any fill, use or  
10 structure hereafter developed pursuant to any such previously  
11 issued determination of applicability in the negative shall not be  
12 subject to review under chapter 91 of the General Laws.

1 SECTION 11. The department of environmental protection  
2 shall undertake a study of ground and surface water flow and  
3 drainage in the sections of the cities of Cambridge, Somerville  
4 and Boston formerly identified as the Miller's River. This report  
5 shall be filed with the clerks of the house of representatives and  
6 the senate on or before December 31, 2008, and an interim report  
7 shall be filed on or before April 1, 2008.